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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1124

NATIONAL HOMEOPATHIC HOSPITAL ASSOCIATION OF THE DISTRICT OF COLUMBIA, a corporation, and AETNA CASUALTY AND SURETY COMPANY, a corporation, *Petitioners*,

v.

THEODORE BRITTON, Deputy Commissioner, District of Columbia Compensation District, U. S. Employees' Compensation Commission, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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v.

THEODORE BRITTON, Deputy Commissioner, District of Columbia Compensation District, U. S. Employees' Compensation Commission, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The petitioners, National Homeopathic Hospital Association of the District of Columbia, a corporation, and Aetna Casualty and Surety Company, a corporation, seeks to have reviewed by this Honorable Court a decision of the United States Court of Appeals for the District of Columbia in a case which arose under the Longshoremen's and Harbor Workers' Compensation Act as applied to the District of

Columbia, U. S. C. Supplement 2, Title 33, ch. 18; 44 Stats. 1424; 45 Stats. 600.

This is a compensation case and was tried before Theodore Britton, Deputy Commissioner, District of Columbia Compensation District, U. S. Employees' Compensation Commission, in this City.

Briefly the facts in this case, which will be set out in more detail later, but which are mentioned here to give a proper understanding of the case, involves one Frank Tyler, who fell in the course of his work and fractured his right knee cap, which knee cap had been previously injured as the result of a previous fall, not connected with his work, and which left him with a permanent partial disability of the right leg. Years before Tyler had lost his left leg at the knee as the result of a railroad accident, and he had also lost his left arm at its surgical neck as the result of another injury. Notwithstanding the previous injuries received by this claimant, namely, the permanent partial disability of the right leg as the result of a fall in January, 1942 while at home and which was not compensable, the loss of the left leg at the knee, and the loss of the left arm, the deputy commissioner, respondent in this case, refused to rate this case under the provisions of section 908 (f) of the Compensation Act in effect in the District of Columbia, hereinafter quoted, but did rate the man as being permanently and totally disabled and based his rating upon the claimant's earning capacity at the time of the fall, holding that the said prior amputations of the lower left leg and left arm, and the condition of the right patella were not industrial injuries and therefore were not previous disabilities within the meaning of section 908 (f) of the Compensation Act. As a result of this decision of the deputy commissioner the petitioners were ordered to pay compensation for total permanent disability whereas if the case had been determined under section 908 (f) of the Compensation Act the petitioners would only be liable to pay for the last injury and the difference between that and total permanent

disability would be paid out of a government fund as provided in said section 908 (f).

Your petitioners, under the provisions of section 921 of the Longshoremen's and Harbor Workers' Compensation Act, as applied to the District of Columbia, brought suit by bill of complaint in the District Court of the United States for the District of Columbia, to set aside the award on the allegation that the deputy commissioner's decision was not in accordance with law. The respondent filed a motion to dismiss petitioners' complaint and the motion to dismiss was granted and an order dismissing the bill of complaint of petitioners was entered, from which order petitioners appealed to the United States Court of Appeals for the District of Columbia. The United States Court of Appeals for the District of Columbia, by a majority opinion, affirmed the award of the deputy commissioner and the decision of the lower court, with Chief Justice Groner dissenting.

It is this decision (R. 59 to 66) which petitioners seek to have reviewed.

The reasons given by the United States Court of Appeals for the District of Columbia by the majority, in supporting the deputy commissioner's award, will be commented upon in detail later on in this brief, and it is not deemed necessary to recite these reasons at this time.

STATEMENT OF THE FACTS.

The record of the testimony developed before the deputy commissioner at the formal hearing held by him on August 19th, 1943 in this case disclosed the following facts:

Frank Tyler, a colored claimant, was 61 years of age in August, 1943 (R. 16). He went to work for the National Homeopathic Hospital in this City as an elevator operator about twenty-seven years ago. At the time he started to work for this Hospital his disabilities due to previous injuries were as follows: His left lower leg was amputated

two and a half inches below the knee. This accident occurred when he was a child as the result of a railroad train running over his left lower leg (R. 21). During the year 1915, or about one year before he came to work for the National Homeopathic Hospital, he was attacked by a man who struck him on the left arm with a stick, as the result of which his left arm was amputated at its surgical neck (R. 20, 21) so that at the time he came to work at the Hospital his left lower leg was missing to a point two and a half inches below the knee and he was minus his left arm. In January, 1942 this claimant, fell, while at home, receiving a fracture of the right patella and a rupture of the rectus femur tendon (R. 50). This fracture was repaired by an open reduction, the tendon was fixed with a bone peg and he was treated by Dr. Robinson from the date of his injury on January 19th, 1942 until April 15th, 1942. Dr. Robinson thought that he would be able to get back to work about May 1st, 1942, and stated, in his opinion, this injury would result in permanent disability and in limited use of the right limb (R. 49, 50). Prior to this injury in January, 1942, the claimant occasionally used a cane but never a crutch. After the injury of January, 1942 he went back to work with a crutch on the 1st of June, 1942. On July 8th, 1942 he fell while at work as the result of his crutch slipping (R. 17) and he received a comminuted fracture of the right patella (R. 46), which necessitated the removal of the knee cap and left him with an unstable condition of the right leg. How much of this unstable condition was caused by the permanent residuals of the injury received in January, 1942, and the second injury in July, 1942, was not definitely set forth in the record made in this case, although it is clear from the record that he had a permanent partial disability from the said injury of January, 1942.

Dr. Custis Lee Hall, orthopedic surgeon in this city testified that he examined the claimant on April 6th, 1943 and that the man had a 45 per cent permanent partial loss of

use of the right leg (R. 24) and that he recommended a certain type of operation which would improve the claimant's right leg condition about 50 per cent from what it was at that time (R. 25).

Dr. John A. Talbot, orthopedic surgeon in this city, gave the same rating on the permanent loss of use of the claimant's right leg as did Dr. Hall (R. 28).

The deputy commissioner called Dr. J. M. Brown, who was the doctor for the District of Columbia Compensation Commission (R. 39, 40, 41, 42, 43, 44). He testified that he did not specialize in orthopedic surgery and was just an ordinary doctor. He testified that he considered that claimant's right leg was an insecure prop and when pressed as to the percentage of disability that he had in his right leg stated that it was a little better than an amputated leg. He further testified in answer to the deputy commissioner's questioning that considering the loss of the claimant's left leg and his left arm, together with the injury sustained on July 8th, 1942, that the claimant had a total disability as to working capacity. No mention was made in the deputy commissioner's questioning of Dr. Brown about the permanent partial disability suffered by the claimant as the result of the injury of January, 1942. Dr. Brown stated on cross-examination he could not answer the question as to the percentage of permanent disability the claimant had to his right leg as a result of the injury of January 19th, 1942 because he did not see the leg at that time.

Dr. Edgar A. Bocock's report as superintendent of Gallinger Hospital was offered in evidence (R. 45, 46) covering the injury that claimant received on July 8th, 1942. This report stated that whether the injury would result in a permanent defect was unknown; that the claimant was discharged from the hospital on August 20, 1942, but on being asked as to the date the claimant would be able to do any work stated that he would probably require four weeks further convalescence.

The report of Dr. Henry S. Robinson (R. 49, 50) attending physician to the claimant while he was confined in Freedmen's Hospital for the injury of January 19th, 1942 stated that as a result of the injury received on that date that the patient would have a limited use of the right limb and that it was a permanent defect.

QUESTION PRESENTED.

The question in this case is whether the United States Court of Appeals for the District of Columbia erred in interpreting section 908 (f) of the Longshoremen's and Harbor Workers' Compensation Act as applied to the District of Columbia in the majority opinion rendered in this case thereby affirming the Deputy Commissioner's Award and Findings of Fact.

When this Act was passed by Congress the Sections were numbered from One to Fifty-one. When the Act was placed in the U. S. Code the Sections were numbered beginning with 901 to 951. All the citations in this petition follow the numbering of the United States Code.

Section 908 (f) of this Act reads as follows:

> "Injury increasing disability: (1) If an employee receive an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury; Provided, however, That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in section 44."

The Court in its majority opinion states that the word "injury" as used in line one and two of the above quoted section is to be given the meaning in its definition in Sec-

tion 902 (2) of the Act hereinafter quoted, and the words "previous disability" in line four of the above quoted section is to be given the meaning of those words as defined in section 902 (10) of the Act hereinafter quoted. The Court in its majority opinion concedes that if these words were used in their ordinary sense petitioners' contention would be correct, but it states they were used in special senses which were defined under the Act.

Following out this theory of reasoning the majority opinion of the Court concluded that the three previous permanent partial injuries suffered by the claimant consisting of the loss of his lower left leg from the knee down, the loss of his left arm at its surgical neck, and the permanent partial disability of the right leg, not having been caused by accidental injuries incurred in the course of previous employments, could not be considered as injuries or previous disabilities under said Section of the Act.

The Court also in its opinion states that the interpretation of the Section in question as contended by petitioners would soon exhaust the special fund mentioned in said section, and therefore would destroy the purpose of the Act.

Petitioners contend that the hearings before the Committee in Congress clearly show that the above mentioned words were to be given their ordinary meaning, that the words are so plain when considered with the purpose to be effected that no other fair construction can be given to them, and that the instant case is one of the types which Congress had in mind when the Act was passed so as to give relief to an employer where he had employed a man suffering from permanent partial disability or permanent partial disabilities received from accidental injuries.

Petitioners' contentions on the question presented are ably supported by Chief Justice Groner's dissenting opinion in this case (R. 62-66).

JURISDICTION.

Jurisdiction to issue the writ prayed for is conferred upon this Honorable Court by Sec. 240-A of the Judicial Code as amended.

The following points are submitted as being substantial grounds for granting the petition and issuing the Writ:

1. Sec. 240-A, Stat. 938, U. S. C. Title 28, sec. 347 (a).

2. The case comes directly within the scope of Rule 38 (5) (c) of this Honorable Court in that the United States Court of Appeals for the District of Columbia has decided a question of general importance involving construction of a statute of the United States, which has not been, but should be settled by this Honorable Court. This Court has previously granted Certiorari in a case involving construction of this Act on the ground of its general importance. See the case of *Del Vecchio et al*, v. *Bowers*, 56 S. C. Rep. 190; 296 U. S. 280, wherein this Court said:

> "We will not ordinarily review decisions of the United States Court of Appeals which are based upon Statutes so limited or which declare the common law of the District. The Longshoremen's and Harbor Workers' Compensation Act, however, is national in scope and a decision with respect to its enforcement constitutes a precedent of general application. We, therefore, granted the Writ because of the important question as to the effect of Section 20 (d). * * * "

This question is of general importance for the reason that no doubt after the present war is over there will be a large number of men seeking employment who have lost eyes or limbs, and the very reason for the inclusion in the Compensation Act of Section 908 (f) as explained by the spokesman for labor at the Congressional hearings, hereinafter set forth, will be nullified by the majority opinion of the United States Court of Appeals for the District of Columbia in this case.

Wherefore, petitioners respectfully pray that a Writ of Certiorari be issued out of this Honorable Court directed to the United States Court of Appeals for the District of Columbia commanding it to certify to this Court for its review and determination a full and complete transcript of the record and all proceedings in case #8688, entitled on its docket "National Homeopathic Hospital Association of the District of Columbia, a corporation, and Aetna Casualty and Surety Company, Inc., a corporation, v. Theodore Britton, Deputy Commissioner, District of Columbia Compensation District, U. S. Employees' Compensation Commission;" and that the judgment entered in said cause by the United States Court of Appeals for the District of Columbia may be reversed; and for such other and further relief as to the Court may seem meet and proper.

James E. McCabe,
Counsel for Petitioners National Homeopathic Hospital Association, a corporation, and Aetna Casualty and Surety Company, a corporation.

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BRIEF IN SUPPORT OF PETITION.

SECTIONS OF COMPENSATION ACT INVOLVED.

Section 908 (f) of the Compensation Law (Title 33 Sec. 908 (f) U. S. C. A.; 44 Stat. 1424), which reads as follows:

> "Injury increasing disability: (1) If an employee receive an injury which of itself would only cause permanent partial disability, but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury: Provided, however, That in addition to compensation for such permanent partial disability, and after the

cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in section 44."

Section 944 (a) (c) (1) (2) of the Compensation Law (Title 33 Sec. 944 (a) (c) (1) (2), U. S. C. A.; 44 Stat. 1424) which read as follows:

(a) There is hereby established in the Treasury of the United States a special fund for the purpose of making payments in accordance with the provisions of subsections (f) and (g) of section 8 of the Act. Such fund shall be administered by the Commission. The Treasurer of the United States shall be the custodian of such fund, and all moneys and securities in such fund shall be held in trust by such Treasurer and shall not be money or property of the United States.

(c) Payments in such fund shall be made as follows:

(1) Each employer shall pay $1,000 as compensation for the death of an employee of such employer resulting from injury where the deputy commissioner determines that there is no person entitled under this Act to compensation for such death. Fifty per centum of each such payment shall be available for the payments under subdivision (f) of section 8, and 50 per centum shall be available for payments under subdivision (g) of section 8.

(2) All amounts collected as fines and penalties under the provisions of this Act shall be paid into such fund.

Section 902 (2) of the Compensation Law, (Title 33, Sec. 902 (2) U. S. C. A.; 44 Stat. 1424) which reads as follows:

"The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person

directed against an employee because of his employment."

Section 902 (10) of the Compensation Law, (Title 33, Sec. 902 (10) U. S. C. A.; 44 Stat. 1424) which reads as follows:

> "'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

Section 921 (b) of the Compensation Law, (Title 33, Sec. 921 (b) U. S. C. A.; 44 Stat. 1424) which reads as follows:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District) * * * "

ARGUMENT.

It was the contention of the petitioners in the complaint filed in the District Court of the United States for the District of Columbia (R-5 to 7) that the Deputy Commissioner should have rated this case under section 908 (f) of the Longshoremen's and Harbor Workers' Compensation Act, effective in the District of Columbia; that he should have rated the extent of the permanent partial disability to the right leg caused by the injury of January 19, 1942, and rated the percentage of permanent disability to the right leg caused by the injury of July 8th, 1942, and held the employer and insurance carrier only liable for the percentage of disability caused by the injury of July 8th, 1942 under said above mentioned provision of the act. It was also contended in this complaint that if the deputy commis-

sioner desired to rate the claimant as being totally and permanently disabled he should have rated the extent of the claimant's disability from the injury of July 8th, 1942 in relation to the full use of his right leg and charged the employer and insurance carrier with the disability only to the right leg in accordance with said section 908 (f) of the Act in question, and if he was then of the opinion that as a result of all of the injuries this claimant received he had a permanent total disability, then the difference between the extent of the disability to the right leg received as a result of the injury of July 8th, 1942 should only be charged to the employer and insurance carrier, and the difference between that percentage of disability and the permanent total disability should be charged to the special fund established under section 944 of the said Act.

It is clear from a reading of section 944 (c) (1) that 50 per cent of the funds collected under section 944 of the Act shall be available for payments under section 908 (f) of the Act. The balance of the funds collected under the provisions of section 944 were to be used under the provisions of section 908 (g) of the Act in question.

It was alleged in said bill of complaint that the findings of fact of the deputy commissioner (R. 9, 10) that the injuries received by this claimant prior to July 8th, 1942 "were not industrial injuries and are not previous disabilities within the meaning of section 908 (f) of the Act" was not a correct statement of the law as set forth in said section 908 (f) of the Act, but was an interpretation read into the Act by the deputy commissioner. It was therefore contended that the deputy commissioner's decision was not in accordance with law and that therefore relief should be granted to restrain the enforcement of the compensation order in whole or in part. It was contended before the United States Court of Appeals for the District of Columbia that the deputy commissioner in order to reach the conclusion which was set forth in his findings of fact had to read into section 908 (f) of the Act in question

certain words which were not there. He had to read into section 908 (f), before the word "injury" in the second line the word "industrial", and between the words "previous disability" in the fourth line he had to insert the word "compensable", and that based upon this line of reasoning he held that section 908 (f) of the Act did not apply. We contended that the deputy commissioner by his findings of fact changed the wording of section 908 (f) to suit his own interpretation. We also contended that although the deputy commissioner by his findings of fact stated that the injuries received by the claimant were not "previous disabilities within the meaning of section 908 (f) of the Act" that said section was the only section in the Act under which the claimant should have been rated on the theory that said section contained no verbiage to the effect that the previous disability mentioned in this section had to be one on which compensation or other recompense had to be paid, nor did the section contain any words showing that the term "injury" as related to previous injury meant "industrial injury" as was found by the deputy commissioner.

The United States Court of Appeals for the District of Columbia, by its majority decision, has affirmed the findings of fact of the deputy commissioner.

By way of explanation it might here be stated that funds which are provided in different State Compensation Laws for taking care of previous injuries suffered by a claimant prior to a compensable injury are given different names. Under the Longshoremen's and Harbor Workers' Compensation Act it will be noted that the fund is simply designated as "the special fund established under section 944". Some of the states call this fund "second injury fund". It will be noted in one of the decisions quoted herein that the fund is designated as "State One Percent Fund", apparently getting its name from the manner in which the funds were raised.

In interpreting the words injury and previous disability as used in section 908 (f) of the Act in different compensa-

tion acts in effect in the United States it seems to be the custom at the beginning of the different acts in question to define certain key words used, such as "employers", "Commission or Industrial Commission", "employee", "injury", "disability", etc. and when Congress passed the Longshoremen's and Harbor Workers' Compensation Act it defined these words.

However, in view of the reason for the insertion of section 908 (f) into the Act, as explained by quotations from the hearings set forth hereafter, it appears clear that the Committee having in mind the reason for the said section being inserted used the word "injury" and "previous disability" in its ordinary sense, and not in the sense that these words were defined under section 902 (2) and (10) of the Act. It is the contention of the petitioners that when this section was inserted Congress was interested in trying to take care of claimants under the Act who might have had permanent partial disabilities to certain parts of their body before they came to work for an employer, such as an eye out, or a leg or arm off, and if they received an additional permanent partial disability, which was added to their previous permanent partial disability making the claimant totally and permanently disabled, that the employer should only have to pay for the permanent partial disability suffered in his employment, and the difference between that and the total permanent disability should be paid for out of the "special fund" mentioned in section 944 of the Act. Bearing in mind the problem which Congress had before it how could this section have been worded better?

The special fund mentioned in Section 908 (f) of the Act, established in section 944, accumulates as the result of employers and insurance carriers paying $1,000.00 into the fund for the death of an employee where the deputy commissioner determines that there is no person entitled under the Act to compensation for such death. Said section 944 provides that fifty percentum of each such $1,000.00 pay-

ment shall be available for payments under the sub-division (f) of section 908, and fifty percentum shall be available for payments under sub-division (g) of section 908. All amounts collected as fines and penalties also go into this fund.

One of the methods of ascertaining the intention of Congress in regards to a specific piece of legislation is to look to the hearings held on the legislation.

The following discussions took place before the Committee on the Judiciary, House of Representatives, 69th Congress, First Session, on Senate Bill 3170 (which is the Longshoremen's and Harbor Workers' Compensation Act) June 29th, 1926 (Serial 16, part 2):

"*Page 172*

Mr. Hinsley: In section 10, page 8 of the Cummins Act, there is a provision I want to discuss: that section is to take care of cases of this kind, we believe. Where an employee has but one eye, and during the course of his employment he loses the other eye, and then becomes permanently disabled; and the burden is not upon the employer to provide for permanent total disability. And the Act then provides a fund so that the Government may pay the difference between the disability that the employee sustained in the course of employment, and the permanent disability compensation. We believe that this payment of $1,000.00 as provided for in Section 45, on page 40—

The Chairman: (Interposing) Well, you say that, if he has lost one eye, and then subsequently, in the course of employment, loses the other eye, he would come under the provisions of this Section?

Mr. Hinsley: Yes, sir.

The Chairman: Well, is that not a little aside from what the section provides? The section provides that if he receives an injury, which of itself would result in partial disability, but which, when combined with an existing disability, either results in total disability or increases the degree of partial disability, and so on. Now, you are speaking of when he loses one eye and in the course of employment loses the other one, that

he should also be entitled to compensation for the second one. But this second applies only to where he is partially disabled, arising out of his employment, and has some existing disability at the time this partial disability arose.

Mr. Hinsley: Yes, then he becomes totally disabled.

The Chairman: Then he becomes totally disabled; and it provides that the employer shall not be liable for anything except the partial disability?

Mr. Hinsley: Yes, sir, that is correct.

The Chairman: And the remainder of the total disability is paid for out of another fund?

Mr. Hinsley: Yes, sir. And our objection is to this fund. This fund is created by assessing every employer $1,000.00 in certain death cases. We think that is a penalty upon the employer; because my Company might not have any men injured under this section; but they might have death cases. So I am paying $1,000.00 for the permanent disability of a man in another employment. Now, we do not object to taking care of men in that position; but we think funds should be provided out of the administration costs, spread out over the whole industry and not through the $1,000.00 fund in death cases. So section 45 is the section that we think should be eliminated.

The Chairman: But let us go one step further. Section 45 establishes a special fund. Now, the only provision regarding this is that it is the concurring result, partly from a disability received in employment, and partly from an existing disability, shall be paid out of this fund.

Mr. Hinsley: Yes, sir.

The Chairman: Now, your objection is to the manner in which this fund is raised, is it not?

Mr. Hinsley: Yes, sir.

The Chairman: Now, that does not apply to that section but it applies to the provisions of this section 45, which provides that an employer shall pay in certain costs?

Mr. Hinsley: Yes, sir.

* * * * * * * * *

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Mr. Montague: Let me see if I understand you. If you have no objection to the $1,000.00 going to persons who have sustained such additional injuries in their employment.

Mr. Hinsley: No, sir.

Mr. Montague: But you do object to the $1,000.00 fund created in this way being applied to those other cases?

Mr. Hinsley: No. We object to the manner of collecting the fund. We do not object to a man who had a previous injury and then went into the employ of a certain employer and sustained another injury so as to make him permanently disabled—for instance, if he had one eye, and then loses the other, we believe he should be taken care of. The employer, of course, does not contribute all of that.

Mr. Montague: I understand that.

Mr. Hinsley: But a portion of it is to come from a fund collected from employers in certain death cases and we object to one man paying $1,000.00 towards this fund which goes to the employee of another; but which should come from the entire industry.

Mr. Montague: I understand that."

* * * * * * * * *

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"In the Statement of John B. Andrews, Secretary of the American Association for Labor Legislation, who appeared before the Committee, recommending the passage of the Longshoremen's and Harbor Workers' Compensation Act, he stated with reference to cases under the Act where there had been a second injury:

'Now, the second injury case that has been discussed in these hearings from the beginning: The second injury proposition is as much to the advantage of the employer and his interest as it is for the benefit of the employee. It protects that employer who has hired, say a one-eyed worker who goes and loses his other eye and becomes a total disability. The employer without this sort of thing would have to pay total permanent disability compensation. Then, on the other hand, this also protects the worker with

> one eye from being denied employment on account of being an extra risk. Now, by simply taking this up in this way it is possible to protect both the employer and to protect the one-eyed employee also * * *."

At this particular hearing Honorable George Graham presided as Chairman of the Judiciary Committee. These hearings can be found in bound volume entitled "Book 1, House Committee Hearings, Before Committee on Immigration, Naturalization and Insular Affairs, Interstate and Foreign Commerce, Irrigation and Reclamation, Judiciary, 1926, Volume 438. Subjects: Various—Senate Library".

In explanation it should be stated that Senator Albert B. Cummins, whose name is mentioned in the excerpts, was Chairman of the Sub-Committee of the Judiciary on Senate Bill 3170, which eventually became known as the Longshoremen's and Harbor Workers' Compensation Act. Reference in the hearings to the Cummins Bill refers to Senate Bill 3170, which eventually became law. The Cummins Act, which originated in the U. S. Senate was reported out by the Committee on the Judiciary, House of Representatives, 69th Congress, and Section 10, page 8 of the Cummins Act became Section 908 (f) of the Longshoremen's and Harbor Workers' Compensation Act as passed by Congress on March 4th, 1927.

In view of the fact that the above quoted excerpts from the hearings on the Compensation Act now before this Court shows the intent of Congress as relates to section 908 (f) of the Act, which is under scrutiny in the instant case, it is clear where a man lost an eye from a previous injury and went to work for an employer and then lost his other eye, Congress intended that the employer for whom the man was working at the time of the second injury should be responsible for compensation only for the loss of the second eye, and that the difference between that loss and total permanent disability for total blindness was to be paid for out of the special fund established by section 944

of the Act, and that this section clearly covers just such a case as the Court has before it in this instance.

Furthermore, it will be noted from the statement of Mr. Andrews, Secretary of the American Association for Labor Legislation, who appeared before the Committee, that the reason this provision was put in the Act was to protect an employer who hires a one-eyed workman where that workman loses his other eye and became totally disabled. This man, who apparently was appearing on behalf of legislation favorable to labor, specifically tells Congress that if an employer did not have a provision such as section 908 (f) in the Compensation Act the employer would have to pay total permanent disability compensation even though the man had a permanent partial disability at the time he came to work for the employer, and that by putting such a provision as section 908 (f) in the Longshoremen's and Harbor Workers' Compensation Act it protected the workman with one eye from being denied employment on account of his being an extra risk.

It is contended that the quotations from the hearings before the Committee makes it perfectly plain what Congress intended by this Section.

No mention was made in the Congressional hearings on the Bill that the word "injury" as used in section 908 (f) of the Act meant "industrial injury", nor that the words "previous disability" meant a "previous compensable disability."

It has been well said that the language of a statute is to be read in the ordinary sense of the words used, according to their grammatical arrangement; the Congress is to be credited with a knowledge of the meaning of the words and the rules of grammar; that the law is to be read prospectively, unless it compels the court to read it retrospectively; that the court is to add nothing to its scope as plainly worded; and these are all elementary rules of statutory construction where there is any necessity or room for construction, citing:

Denn v. *Reed*, 10 Peters 524; 9 L. Ed. 524.
Market v. *Hoffman*, 101 U. S. 112; 25 L. Ed. 782.
Lake County v. *Rollins*, 130 U. S. 662; 32 L. Ed. 1060.
U. S. v. *Goldenberg*, 168 U. S. 95; 42 L. Ed. 394.
Hamilton v. *Rathbone*, 175 U. S. 414; 44 L. Ed. 29.

In the case of *John Thornley, appellant* v. *U. S.*, 113 U. S. 310, 28 L. Ed. 99, the Supreme Court of the United States in passing upon the construction of a statute involving the longevity pay of a naval officer said:

> "Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no need for construction * * * Applying this rule we are of opinion that the case of the appellant finds no support in any act of Congress."

In the case of *St. Paul M. & M. R. Co.* v. *Phelps*, 137 U. S. 528, 530, 24 L. Ed. 767, the Supreme Court of the United States in interpreting an Act of Congress of 1857 granting lands to the territory of Minnesota to aid in the construction of railroads, said:

> "But where a statute, as in this case, is clear and free from all ambiguity we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the Government, even though it may be the settled practice of the department."

Chief Justice Groner in his dissenting opinion with reference to section 908 (f) of the Act in question (R. 64, 65) said:

> "* * * It seems to me clear that when Congress inserted the clause in question, its object and concern were to make an exception to the provisions of the Act which impose on the employer a fixed liability in all cases of industrial or occupational injury; and while securing full compensation to the injured by charging part of the cost to the special fund, to hold the employer responsible only for that part which arose out of the then employment. * * *"

> " • • • and it is not unreasonable, I think, to assume that Congress recognized that a one-legged man, a one-armed man, or a one-eyed man, whose disability may have existed for years, would have little chance in the ordinary labor market if the employer is forewarned that in the event of an injury, he would be faced with full liability. The facts of this case seem to me to emphasize the correctness of the reasoning, for it is most unlikely, every one will agree, that the injured man in this case, with only one leg and one arm, would ever have found a job if the employer knew that, in the event of a minor accident, liability would be calculated on the basis of both the new and the old. It seems therefore a fair conclusion that to avoid this discrimination in employment between an apparently sound and an obviously unsound man, Congress wrote in the exception and this, I think, is confirmed in a fair consideration of the evidence of the spokesman for labor at the Congressional hearings • • • "

This view is supported by different state courts in their interpretation of the second injury fund clause in their different Compensation Acts.

In the case of *Richardson* v. *Essex National Trunk & Bag Co., Inc., et al.,* decided by the Court of Errors and Appeals of New Jersey on September 22d, 1937, *194 A. 622, 119 N. J. L. 47*, that Court held that under their statute entitling compensation claimant to compensation for total and permanent disability, where caused by compensable accident following prior non-compensable accident, the employer was liable only for the second accident and the State "One Per Cent. Fund" was liable to the employee for the difference necessary to satisfy total and permanent disability suffered by him. In that case the Court said:

> "Thus the Legislature set out to, and did eliminate the employers' liability for an accident unrelated to the employment of the injured person. We discern in its legislation of 1936 a clear intent not to impose any greater obligation upon an employer who hires or employs a person previously injured than if he had hired a person not so injured. The language of the last

> stated Act fully supports our construction and application thereof. It provides (N. J. St. Annual 1936—Sec. * * * 236-93) that the State 'One Per Cent. Fund' shall make payments to 'cover that portion of the period for which the employer is not legally responsible due to the permanent and partial disability suffered or possessed by the employee at the time that the employee sustained the injury as a result of which employee became totally and permanently disabled'. This, to us, evinces a definite purpose to exclude liability for disabilities not flowing from the second accident. If it were otherwise, the whole philosophy upon which the State's plan is founded would crumble and fall; it would be rendered nugatory. This clearly was not the purpose of the Act of 1935."

In the case of *State ex rel Garwin* v. *District Court of Cass County, et al.*, 151 N. W. Rep. 910; 129 Minn. 156, decided by the Supreme Court of Minnesota on March 19th, 1915, the Supreme Court of Minnesota had before it a case somewhat similar to the one now before this Court, and involving a statute which is worded exactly the same as the statute in the instant case as regards previous injury or disability.

In this Minnesota case the claimant was totally blind in one eye, having lost the sight thereof by an accidental injury suffered some time prior to his employment with the respondent. This was considered a permanent partial disability within the State Compensation Statute. While engaged in work for respondent the claimant suffered another injury which totally destroyed the sight of his remaining eye, thus rendering him totally blind. Upon these facts the Trial Court awarded compensation under the Statute for a permanent partial disability, which was affirmed by the Supreme Court of Minnesota. Claimant contended before the Supreme Court on appeal that he had a permanent total disability resulting from the loss of both eyes and that he was entitled to compensation upon that basis. In this case the Court said:

"* * * No doubt in the enactment of the statute and in providing for relief in cases of this kind, the Legislature had in mind the fact that persons suffering from permanent partial disability would seek such employment as their remaining ability would fit them to discharge, and express provision was made in the statute to protect the employer from liability for injuries received by an employee before entering his service. To this end section 15 of the Act was incorporated therein. That section provides:

> 'If an employee receive an injury, which, of itself, would only cause permanent partial disability, but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury.''

The language of the statute is clear and unambiguous, and clearly was intended to limit the liability of the employer to compensation commensurate with the injury suffered by the employee while in his service and to relieve him from the consequences of injuries previously sustained even though both resulted in permanent total disability. From the viewpoint of the Legislature, and the fact that the liability created is founded upon no wrong of the employer, it would seem fairly clear that this limitation upon the liability was deliberately made, and founded in justice and fairness. The employer accepts in his service the disabled employee, knowing of the disability and with the knowledge that under the compensation statute he is liable for accidental injuries to such employee while engaged in his service, but to couple the prior disability with one suffered while in his service and make an employer liable for both, would seem a hardship the Legislature intended to avoid. At least we think the language of the statute clearly manifests that intention. The statute is too plain to admit any other view, and there is no room for judicial construction. While it is true that the combined injuries result in total disability, the statute declares that as to the last employer it shall be treated as a partial disability. That the Legislature had the right to so provide cannot well be questioned. And, though the statute is remedial in the broadest

sense of the term and to be liberally construed, the court is without power or authority to change the plain language thereof by construing it to mean the reverse of what is clearly stated therein * * *."

It will be noted that section 15 of the Minnesota Act mentioned in the above decision uses the exact language as is used in the first part of section 908 (f) of the Longshoremen's and Harbor Workers' Compensation Act involved in the instant case. The only difference is that beginning where the Minnesota Act ended Congress added thereto the proviso that in addition to compensation for such permanent partial disability the employee should be paid the remainder of the compensation that would be due for permanent total disability, such additional compensation to be paid out of the special fund established in section 944 of the Act, which section is previously set forth in this brief.

In the case of *Wheeling Metal & Mfg. Co.* v. *Workmen's Compensation Com'r*, 2 S. E. Rep. (2d) 252, 121 W. Va. 155, decided on March 21st, 1939 by the Supreme Court of Appeals of West Virginia, it was held that where an employee was entitled to a rating totalling permanent disability as the result of a prior non-compensable injury, not waived by him, and a subsequent compensable injury, the employer in whose service the subsequent injury was received should have been charged only with an amount equal to partial permanent disability attributable to the subsequent injury; and that the residue was to be paid from funds under the control of the Compensation Commissioner under the West Virginia Compensation Code of 1931, 23-2-4; Code 1937, 23-4-9b. In that case the claimant in 1912 while working for an employer received an injury which resulted in the amputation of his right forearm about two inches below the elbow. After recovery from the amputation he remained in the service of the same employer and in January, 1938 in the course of, and resulting from his employment, he received a severe injury to his left hand which

incapacitated the man from labor. In this case the court said:

> "We recognize fully that in statutory enactment or judicial decision it would have the effect of placing on employers of previously injured men a burden wholly disproportionate to the responsibility which attends the employment of unimpaired men, and would probably have the unfortunate result of deterring employers from taking into their employment men who had received bodily impairment. Such consequences would, of course, create a grievous situation. However, in this State in both enactment and decision an effort has been made to guard against creating a condition which would permit employers to discriminate against employees who had suffered some physical impairment.

In the case of *Marker* v. *Industrial Commission*, 37 Pac. 785, 84 Utah 587, decided November 19th, 1934, the Supreme Court of Utah had before it a compensation claim involving a workman who had lost industrial vision of his right eye in 1903 in a foreign jurisdiction long before Utah had passed a compensation act. In 1929 the claimant sustained the loss of his left leg below the knee for which he was paid compensation. He claimed compensation for permanent and total disability and claimed the loss of the eye should be paid out of the second injury fund under the Utah Act. The Industrial Commission of Utah rejected the claim on the theory that the man had not completely lost the vision of his right eye and that the injury having occurred before the passage of the Utah Compensation Act it was not retroactive. The Court in reversing the Ind. Comm. held the claimant entitled to receive benefits under the special fund for the first eye injury as the employer had fully discharged all of its obligations under the law for the second injury:

The Court said:

> "Subdivision 6 of Section 3140 Compensation Laws Utah 1917 as amended (R. S. 1933, 42-1-65), provides for compensation to be paid because of a condition of disability created subsequent to the date of the act by

reason of a subsequent partial disability combined with a previous partial disability. It is the condition of the employee resulting because of a subsequent injury that is to be compensated. The statutory language is broad and sweeping in its scope. The word "previously" is used without limitation or condition. This word is defined in Webster's New International Dictionary as "beforehand; antecedently", and "previous" is defined as going before in time; being or happening before something else; antecedent; prior". The Legislature saw fit to use the word without limitation as to time. We must conclude, therefore, that the disability referred to is one that had been incurred at any time previous to the subsequent partial disability. The Legislature having imposed no limitation or condition as to time or place of the incurring of the previous disability we know of no rule of law which requires or permits us to do so by way of construction. The Legislature undoubtedly intended as is conceded by the Attorney General, to provide protection for men who had already been partially permanently disabled, but yet were able to do work. * * * Without some provision of this kind, employers would be extremely hesitant in employing men partially disabled, since an injury resulting in partial permanent disability of the employee might well impose greater liability on the employer than a similar injury incurred by a person not previously disabled. The legislative intent is fully met only when the words 'previously incurred' are construed to refer to disability incurred at any time previous to the subsequent disability and to include cases of permanent partial disability incurred before as well as after, the effective date of the act. To this extent the provision operates retrospectively by legislative intent clearly expressed."

In the case of *Panther Creek Mines, Inc.* v. *Industrial Commission*, 342 Ill. 68; 173 N. E. 818, the Supreme Court of Illinois had before it for interpretation the Illinois Compensation Statute (Cahill's Rev. Stat. 1927, Chapter 48, paragraph 208) which among other provisions said:

> "* * * Provided further that any employee who has in a previous and independent accident suffered the loss or permanent and complete loss of the use of any one of said members, and in a subsequent independent accident loses another or suffers the permanent and complete loss of the use of any one of said members, the employer for whom the injured employee is working at the time of said last independent accident shall be liable to pay compensation only for the loss or permanent and complete loss of the use of the member occasioned by said last independent accident."

The claimant in this case had previously lost an eye and subsequently had lost his remaining eye. The sole question was to determine the last employer's liability and whether claimant was entitled to come under the second injury fund. The Court held that the second employer's liability was only for the loss of the remaining eye, plus temporary total incapacity, and that the payment from the fund was to start after payments for temporary total and permanent ceased.

In the majority opinion of the court in the instant case it is stated that petitioners' construction of the words involved in section 908 (f) would defeat not only the letter of the statute but its purpose, and asserting that the special fund established by section 944 of the Compensation Act is a small fund and it would soon be exhausted if it were to be drawn upon in every case in which a total disability results from the combination of an "injury" with previous defect or incapacity, and there would then be no way of paying the claims which Congress intended should be paid out of this fund (R. 62). No better answer to this statement of the court in its majority opinion can be made than the dissenting opinion of Chief Justice Groner (R. 64, 65) wherein he states:

> "It is accordingly, I think, clearly incorrect to argue, as the Board does, that by construing the term 'disability' in its ordinary sense, the effect would be to bring within the exception clause cases of injury from weak heart, diseased back, congenital deformity and such like afflictions. For, as was said by the New York

> Court of Appeals, and as has been said by us, and indeed by practically all of the circuits, weakness, whether pathological or traumatic, which does not become manifest until a subsequent accident, is not ordinarily thought of as prior disability under any provision of the Act. And this generally accepted view is borne out by the great volume of decisions holding that a subjective ailment, as a diseased heart, a diseased kidney, or a congenital deformity, or a pathological condition contributing to an injury or a death, does not relieve the employer from the obligation of total indemnity." * * *

Numerous Federal cases are cited by Chief Justice Groner in support of the above mentioned statement, which are found on the bottom of page 65 of the record in this case.

The statement by the court in its majority opinion tha. the fund established by Section 944 of the Act is a small fund which would soon be exhausted if it were to be drawn upon in this particular type of case is questioned by your petitioners. There is no evidence in the record in this case that this fund is a small fund. It is petitioners' understanding that there are two funds under section 944 of the Longshoremen's and Harbor Workers' Compensation Act; one fund results from the accumulation of the $1,000.00 payments made into the fund and fines and penalties under the Act as made applicable to the District of Columbia, and the other fund is the national fund collected outside of the District of Columbia from the same source under section 944 of the Act.

At the time Congress passed the Longshoremen's and Harbor Workers' Compensation Act in 1927 it probably had no guide to use when it established the fund under section 944 (a) (c) (1) (2). Whether the fund would be sufficient for the purpose of the Act by the payments which were to be made into it very likely was unknown to Congress. Congress had no statistical table to show how this section of the act would function, or whether the sums rea-

lized from the $1,000.00 payments and other receipts would be sufficient to maintain the fund. If the fund became depleted there was no reason why Congress could not increase the payments into the fund by amending the Act. There is nothing in the record in this case to show that the funds provided under section 944 of the Act would be exhausted if section 908 (f) of the Act was construed as petitioners claim it should be construed.

CONCLUSION.

It is petitioners' contention that the deputy commissioner having erred in his findings of fact and award in this case the United States Court of Appeals for the District of Columbia in its decision should have reversed the decision of the District Court of the United States for the District of Columbia in its order dismissing the bill of complaint filed by the petitioners, and required the deputy commissioner to vacate and set aside the findings of fact and award made in this case, and that the case should have been remanded to the deputy commissioner with instructions to rate the case under the provisions of section 908 (f) of the Compensation Act.

Petitioners believe that the intent of Congress at the time the Compensation Act in question was passed is clearly shown from the excerpts of the Hearings quoted herein and that section 908 (f) was an exception to the rest of the Compensation Law and was placed therein so that employees having lost eyes, arms or legs as the result of previous accidental injuries could be employed by employers without their being held liable for the previous injuries if the employees in question received further permanent partial disabilities while in the employment.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1124

NATIONAL HOMEOPATHIC HOSPITAL ASSOCIATION OF THE DISTRICT OF COLUMBIA, AND AETNA CASUALTY AND SURETY COMPANY, PETITIONERS

v.

THEODORE BRITTON, DEPUTY COMMISSIONER, DISTRICT OF COLUMBIA COMPENSATION DISTRICT, U. S. EMPLOYEES' COMPENSATION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The judgment of the District Court of the United States for the District of Columbia (R. 54) was entered without an opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 59–66) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 1945 (R. 67). The petition

for a writ of certiorari was filed on April 7, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an employee, injured in the course of his employment, had a "previous disability" within the meaning of Section 8 (f) (1) of the Longshoremen's and Harbor Workers' Compensation Act, when his earlier injuries did not arise "out of and in the course of employment".

STATUTES INVOLVED

The relevant portions of the statutes involved are set forth in the Appendix, *infra,* pp. 13–16.

STATEMENT

The following facts are undisputed:

On July 8, 1942, Frank Tyler, sixty-one years old and employed as an elevator operator in the District of Columbia by petitioner, National Homeopathic Hospital Association of the District of Columbia, slipped and fell at his place of employment, sustaining an injury to his right knee cap, which later required its removal (R. 9–10, 16–17). Prior to such injury, Tyler had suffered several non-industrial accidents for which no compensation or recompense had been received: (1) as a child, he had been run over by a railroad train, necessitating the amputation of his left

lower leg; (2) some years later, he received a blow upon his left arm, leading to the amputation of the entire arm; (3) in January 1942, he slipped on a wet pavement, fracturing his right knee cap (R. 10, 20–23).

On the basis of his injury of July 8, 1942, Tyler filed a claim for compensation, under the Longshoremens' and Harbor Workers' Compensation Act, with the deputy commissioner (R. 14).[1] After a hearing (R. 13–44), the deputy commissioner found (R. 11) that Tyler had "permanently lost practically the entire use of his right leg" from the injury of July 8, 1942, and that this injury, "combined with the said preexisting amputations of his left lower leg and left arm" caused him "to become permanently and totally disabled." The deputy commissioner also found (R. 10) that the injuries sustained prior to July 8, 1942 "were not industrial injuries and are not previous disabilities within the meaning of Section 8 (f) of the Act." Accordingly, petitioners (the employer and the insurance carrier) were held liable for compensation based upon permanent total disability (R. 11).

On September 30, 1943, petitioners filed a complaint (R. 1–8) in the district court under Section 21 (b) of the Act, seeking to set aside the com-

[1] The Act was made applicable to the District of Columbia as a general workmen's compensation law by the Act of May 17, 1928, 45 Stat. 600, D. C. Code, 1940, sec. 36–501, see Appendix, *infra*, pp. 15–16.

pensation order. In addition to attacking the finding of permanent total disability, petitioners challenged the finding that Tyler's injuries incurred prior to July 8, 1942 "were not industrial injuries and are not previous disabilities within the meaning of section 8 (f) of the Act." Upon motion on behalf of the deputy commissioner (R. 53), the district court dismissed the complaint (R. 54). On appeal, the court below affirmed the judgment, Judge Groner dissenting (R. 67).

ARGUMENT

Tyler's injury of July 8, 1942, by itself, would have caused only a permanent partial disability. When combined with the pre-existing amputations, however, this injury was found (R. 11) to have caused Tyler to become permanently and totally disabled. Asserting that the words "previous disability" and "injury" in Section 8 (f) (1), Appendix, *infra,* pp. 13–14, are used in their "ordinary sense" (Br. 16), petitioners contend here, as they did below, that prior to July 8, 1942, Tyler was "previously disabled" and that therefore the deputy commissioner should have found Section 8 (f) (1) applicable and should have limited petitioners' liability to that consequent upon a partial disability. But the terms "disability" and "injury" are specifically defined in Section 2 of the Act, and the court below, applying these definitions, read the words "previous disability" in Section 8 (f) (1) as meaning "previous incapacity

because of accidental injury arising out of and in the course of employment" (R. 60). Since Tyler's earlier injuries arose outside of employment, the court below sustained the deputy commissioner's finding that Tyler was not "previously disabled" within the meaning of Section 8 (f). The evidentiary basis for the deputy commissioner's award is no longer challenged,[2] and we believe that the statutory provisions have been properly construed.[3]

If the words "disability" and "injury" in Section 8 (f) were given their ordinary meaning, Section 8 (f) would undoubtedly apply to the instant case. However, the Act expressly defines these words, and "in such circumstances definition

[2] Petitioners have apparently abandoned, as they did in their brief below, the contention made in the district court (R. 5) that the finding (R. 11) of permanent total disability was "contrary to the evidence." In any event that contention is unsound, for without reviewing all the evidence we need only advert to the testimony (R. 40) that Tyler now suffers "total disability" in terms of working capacity and that he is "not at all" employable. It is well settled that the basic facts found by the deputy commissioner are conclusive if supported by substantial evidence. *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251; *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244.

[3] Upon judicial review of an order under the Act, deference will be given to the views of the agency charged with its administration. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *Skidmore* v. *Swift & Co.*, 323 U. S. 134; compare *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, with *Norton* v. *Warner Co.*, 321 U. S. 565; cf. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 130–131.

by the average man or even by the ordinary dictionary * * * is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others." *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96. The term "disability" is defined, in part, as "incapacity because of *injury* to earn the wages which the employee was receiving at the time of injury" (Section 2 (10)). "Injury," in turn, is defined, in part, as "*accidental injury* or death *arising out of and in the course of employment*" (Section 2 (2)) [italics supplied] (Appendix, *infra*, p. 13). Reading these two definitions together, the words "previous disability" in Section 8 (f) become "previous incapacity because of accidental injury arising out of and in the course of employment, * * *."

It is argued that the definition of "injury" should not be read into the definition of "disability"; if we use the definition of "injury", it is contended, we must use the entire definition, including the words "or death," and when this full definition is read into the definition of "disability" it produces incongruous results, *viz.*, "previous incapacity because of accidental injury *or death* arising out of and in the course of employment." [Italics supplied.] But, as the court below observed (R. 61), "the flaw in the argument is simply that the statutory definition of 'injury' comprises alternative events of different sorts,"

and "it is not necessary that both occur in order that 'injury' occur." If, as petitioners suggest, the definition of "injury" were to be ignored in construing Section 8 (f), the employer would find himself liable to compensate an employee for injuries incurred outside of employment, since it is the definition of "injury" which contains the qualifying words "arising out of and in the course of employment."

Apart from the definitions in the Act, established principles of construction require the result reached by the deputy commissioner. It is well settled that the employer is liable for the consequences of an accident even though the employee's previous defects (e. g., weak heart, diseased condition, etc.) contributed to the production of those consequences. *Hoage* v. *Employers' Liability Assurance Corp.*, 64 F. 2d 715 (App. D. C.), certiorari denied, 290 U. S. 637; *Commercial Casualty Insurance Co.* v. *Hoage*, 75 F. 2d 677 (App. D. C.); *Great Atlantic & Pacific Tea Co.* v. *Cardillo*, 127 F. 2d 334 (App. D. C.); *Pacific Employers' Insurance Co.* v. *Pillsbury*, 61 F. 2d 101 (C. C. A. 9). Since Section 8 (f) is an exception to this general rule, it should be narrowly construed. *Piedmont & Northern Ry. Co.* v. I. C. C., 286 U. S. 299, 311. This rule of statutory construction is peculiarly applicable here, for Congress must be presumed to have authorized no

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greater charges against the special fund (out of which Tyler must be compensated if petitioners are not fully liable (See Section 8 (f) (1), Appendix, *infra*, p. 14)) than the fund itself could bear.[4] If Section 8 (f) were construed broadly to cover all cases of prior disability—including disease, congenital defects, and injuries sustained outside of employment—the "special fund" would be quickly exhausted.[5] "There is a presumption against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience." *United States* v. *Powers*, 307 U. S. 214, 217. Petitioners seek to lessen the burden upon the "special fund" by admitting (Br. 29–30) that employers are not relieved of "the obligation of total indemnity" in cases involving preexisting latent infirmities—"weak heart, diseased back, congenital deformity and such like afflictions." This concession, however, contradicts petitioners' basic con-

[4] The "special fund" established in Section 44 of the Act is comprised of "all amounts collected as fines and penalties" under the Act, and payments of $1,000 by the employer in each case of "death of an employee of such employer resulting from injury where the deputy commissioner determines that there is no person entitled under this Act to compensation for such death." See Appendix, *infra*, p. 14, Section 8 (f) (1), for liability of the fund, and p. 15 for its composition.

[5] The accumulations in the "special fund" for the District of Columbia, since 1928, amount to only $55,374.63. Twenty-eighth Annual Report of the United States Employees' Compensation Commission (July 1, 1943 to June 30, 1944), p. 56.

tention that "disability" is used in Section 8 (f) in its "ordinary sense," for the latent infirmities mentioned above are clearly "disabilities" in the ordinary meaning of that term.[6]

The deputy commissioner's construction, affirmed by both courts below, is in conformity with the other decisions under the Act. *Sicms-Spokane Co.* v. *Marshall,* Civ. Action No. 640, W. D. Wash., N. Div., decided April 1, 1943, unreported (loss of sight of one eye in nonindustrial accident followed by loss of sight of other eye in industrial accident); *Liberty Stevedoring Co., Inc.* v. *Cardillo,* 18 F. Supp. 729 731 (E. D. N. Y.) (osteomyelitis in leg and claw-foot deformity due to natural causes, followed by industrial injury necessitating amputation of same leg); *Grays Harbor Stevedore Co.* v. *Marshall,* 36 F. 2d 814, 815 (W. D. Wash.) (arthritis of the spine aggravated by industrial injury). Moreover, the deputy commissioner's view accords with the decisions under the New York Workmen's Compensation Law,[7] which was the model for the Federal Act. *LaBelle* v. *Britton Stone & Supply Corp.,* 247 App. Div. 843; *Van Ooteghem* v. *Sisters of the Good*

[6] Webster's New International Dictionary (2d Ed.), p. 740, defines "disability," in part, as:

"1. State of being disabled; deprivation or want of ability; absence of competent physical, intellectual, or moral power, means, fitness, or the like; also, an instance of such lack."

[7] Section 15 (7) and (8), McKinney's Consolidated Laws of New York, Section 15 (7) and (8).

Shepherd, 249 App. Div. 898; H. Rep. No. 1422, 70th Cong., 1st Sess., pp. 1–2.[8]

We know of nothing in the legislative history of the Act to support a contrary view. Petitioners rely (Br. 17–20) upon statements by two witnesses at the hearings before the House Committee.[9] But the quoted testimony shows that the matter under discussion with one witness was the manner in which the "special fund" was to be raised, rather than the scope of Section 8 (f). Neither

[8] The state court decisions cited by petitioners (Br. 23–30) are not pertinent here, for they involve statutes which are unrelated to, and markedly different from, the Federal Act. In *Richardson* v. *Essex National Trunk & Bag Co., Inc.*, 119 N. J. L. 47, the statute was devoid of definitions, and had been amended several times to broaden the liability of the special fund. *State ex rel. Garwin* v. *District Court of Cass County*, 129 Minn. 156, involved a statute which did not define "disability" or "injury," and did not even provide for a "special fund." In *Wheeling Metal & Manufacturing Co.* v. *Workmen's Compensation Commissioner*, 121 W. Va. 155, the statute expressly provided for the case of a "definitely ascertainable [previous] physical impairment originating otherwise than from an injury received in the course of and resulting from employment." W. Va. Code of 1937, sec. 2534 (2). In *Panther Creek Mines, Inc.*, v. *Industrial Commission*, 342 Ill. 68, the statute referred to an employee "who has in a previous and independent accident suffered the loss or permanent and complete loss of the use of" (a hand, arm, foot, leg, or eye) and "in a subsequent independent accident loses another or suffers the permanent and complete loss of the use of any one of said members." 1927 Cahill's Ill. Rev. Stat., c. 48, sec. 208 (e) (18). In *Marker* v. *Industrial Commission*, 84 Utah 587, the statute lacked a definition of "disability," even though it used the phrase "previously incurred permanent partial disability."

[9] House Committee on the Judiciary, Hearings on S. 3170, 69th Cong., 1st Sess., pp. 172–173, 208.

witness adverted to the question whether the earlier injury need be sustained in the course of employment. In any event, something more than the statements of these witnesses, neither of whom appears to have drafted the legislation, should be required to overcome the carefully defined words of the Act.

Petitioners urge (Br. 22–23) that the deputy commissioner's construction would deter the employment of persons suffering from patent infirmities (e. g., loss of a leg, an arm, or an eye) since employers, it is said, would be unwilling to undertake the risk of full liability that would accompany the employment of such persons. But, if an employer were to consider such a factor, he would be equally careful to check for latent infirmities (e. g., weak back, weak heart, etc) in his prospective employees. Yet, as noted above, petitioners admit that under the Act the employment of persons with latent defects carries with it the risk of full liability. Had Congress conceived of Section 8 (f) as a protective device against discriminatory hiring practices, it would hardly have singled out for protection only those persons having patent infirmities—especially since it is common knowledge that that group is much smaller than those suffering from latent infirmities.

CONCLUSION

The decision below is correct and there is no conflict. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1945.

APPENDIX

1. The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. 901, *et seq.*, provides, in part, as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

* * * * *

COMPENSATION FOR DISABILITY

SEC. 8. Compensation for disability shall be paid to the employee as follows:

* * * * *

(f) Injury increasing disability: (1) If an employee receives an injury which of itself would only cause permanent partial disability but which, combined with a pre-

vious disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury: *Provided, however,* That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in section 44.

(2) In all other cases in which, following a previous disability, an employee receives an injury which is not covered by (1) of this subdivision, the employer shall provide compensation only for the disability caused by the subsequent injury. In determining compensation for the subsequent injury or for death resulting therefrom, the average weekly wages shall be such sum as will reasonably represent the earning capacity of the employee at the time of the subsequent injury.

* * * * *

REVIEW OF COMPENSATION ORDERS

SEC. 21. * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). * * *

SPECIAL FUND

SEC. 44. (a) There is hereby established in the Treasury of the United States a special fund for the purpose of making payments in accordance with the provisions of subsections (f) and (g) of section 8 of this Act. * * *

(c) Payments into such fund shall be made as follows:

(1) Each employer shall pay $1,000 as compensation for the death of an employee of such employer resulting from injury where the deputy commissioner determines that there is no person entitled under this Act to compensation for such death. Fifty per centum of each such payment shall be available for the payments under subdivision (f) of section 8, and 50 per centum shall be available for payments under subdivision (g) of section 8.

(2) All amounts collected as fines and penalties under the provisions of this Act shall be paid into such fund.

* * * * *

(g) All civil penalties provided for in this Act shall be collected by civil suit brought by the commission.

2. Section 1 of the Act of March 17, 1928, 45 Stat. 600, D. C. Code, 1940, sec. 36–501, provides as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the Act entitled "Longshoremen's and Harbor Workers' Compensation Act," approved March 4, 1927, including all amendments that may hereafter be made

thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

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